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Before the

**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of )  
 )  
Amendment of Section 73.202(b) )  
Table of Allotments ) MB Docket No. 05-112  
FM Broadcast Stations ) RM - 11185  
(Fredericksburg, Texas) )

To: Office of the Secretary  
Attn: Assistant Chief, Audio Division  
Media Bureau

FILED/ACCEPTED

JUN 15 2007

Federal Communications Commission  
Office of the Secretary

**REPLY COMMENTS**

Capstar TX Limited Partnership, CCB Texas Licenses, L.P., Clear Channel Broadcasting Licenses, Inc., and Rawhide Radio, L.L.C. (together, "Joint Parties") hereby submit their Reply Comments to the Public Notice (Report No. 2814) issued on May 31, 2007, in the above captioned proceeding. The Public Notice announced the acceptance of the Counterproposal filed by the Joint Parties in this proceeding on May 9, 2005.<sup>1</sup> Previously, Munbilla Broadcasting Properties, Ltd. ("Munbilla"), filed Reply Comments on May 24, 2005 in response the Joint Parties Counterproposal. Munbilla asserted that the Counterproposal was defective because it failed to protect an authorization issued to Munbilla after the filing of the Joint Parties' original proposal in MM Docket No. 00-148 but before the same proposal was filed in this proceeding. Thus, Munbilla's position is that the Joint Parties may not refile their original proposal in this proceeding without losing its place in line with respect to Munbilla's permit. This argument is, however, without merit because the Commission must, consistent with procedural due process as

<sup>1</sup> As discussed herein, the Joint Parties' Counterproposal in this proceeding is the exact same proposal that the Joint Parties filed in MM Docket No. 00-148. That proceeding is still pending due to an Application for Review filed by the Joint Parties on May 4, 2004. The Joint Parties filed the same proposal in this proceeding because the proposal for Fredericksburg, Texas conflicts with the Joint Parties' Counterproposal in MM Docket No. 00-148 and the Joint Parties wanted to ensure that their earlier filed proposal is not ignored in this proceeding.

well as the express condition set forth in the Munbilla permit, protect the Joint Parties' proposal as long as it remains pending (whether in MM Docket No. 00-148 or in this docket) from later filed applications and proposals.

**I. The Joint Parties' Proposal Is Entitled to Protection from Munbilla's Construction Permit, Not the Other Way Around.**

1. On October 11, 2000, the Joint Parties filed their original proposal in MM Docket 00-148. The proposal met all of the Commission's technical rules at that time. The Commission dismissed the proposal for procedural reasons but it is still pending by virtue of an Application for Review filed by the Joint Parties on May 4, 2004. Over the last 7 years the Commission has accepted and considered several conflicting proposals,<sup>2</sup> first due to the failure to enter the original proposal into the Commission's data base and then, after the dismissal of the proposal, due to the *Auburn*<sup>3</sup> policy. In fact, as recently as April 27, 2007, the Commission issued an *NPRM* in MB Docket No. 07-78 (Christine, TX) proposing another conflicting allotment. Perhaps a more efficient practice would have been for the Commission to rule on the pending Application for Review filed by the Joint Parties, rather than to continue to accept contingent proposals.

2. On September 2, 2003, Munbilla filed an application for Station KHLE (previously KHLB), Burnet, Texas, (BPH20030902ADU), knowing that it was short spaced to the Joint Parties' earlier filed proposal in MM Docket No. 00-148. Specifically, the KHLE permit site is short spaced by 3 kilometers to the proposed substitution of Channel 297A to Llano, TX for Station KAJZ. On June 29, 2004, the Commission issued the KHLE permit with

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<sup>2</sup> For example, it dismissed petitions for rule making for Benjamin, Texas and Mason, Texas that had been erroneously accepted and docketed. See *Benjamin and Mason, Texas*, 19 FCC Rcd 470 (2004). It took similar actions in *Tilden, Texas*, 19 FCC Rcd 9112 (2004); *Goldthwaite, Texas*, 19 FCC Rcd 4810 (2004); and *Shiner, Texas*, 19 FCC Rcd 4327 (2004).

<sup>3</sup> *Auburn, Alabama, et al.*, 18 FCC Rcd 10333 (MB 2003).

the condition that if Channel 297A were to be allotted as a substitute channel at Llano, Texas for Station KAJZ, the Munbilla permit would be automatically cancelled. Munbilla accepted this condition and the condition remains because the Joint Parties' proposal to allot Channel 297A at Llano is still pending.

3. In this proceeding, the Commission cited the *Auburn* case when it decided to issue the *NPRM* for the allotment of Channel 256C3 to Fredericksburg, Texas. Under *Auburn*, third parties can file new proposals relying on rule making grants that are subject to appeal and therefore not final. Because the Fredericksburg proposal is contingent on the Joint Parties' proposal in MM Docket No. 00-148, the Joint Parties felt compelled to refile their proposal in this proceeding to ensure it remains protected. Notwithstanding this refiling, the Joint Parties' proposal for Channel 297A at Llano remains the same as far as Munbilla is concerned. The KHLE Burnet permit is still short spaced to the Channel 297A proposal at Llano by 3 kilometers. The proposal before the Commission in this proceeding is exactly the same – the substitution of Ch. 297A at Llano, Texas. It makes no sense for Munbilla to be able to argue that although it knowingly accepted a condition that its preferred site for Station KHLE was subject to the Llano proposal when filed in 2000, it is no longer subject to the same proposal when refiled in the current proceeding. To accept such an argument would be to place form over substance. To better deal with this problem created through no fault of the Joint Parties, the Commission should, at the very least, delay action in the Fredericksburg proceeding until after MM Docket 00-148 is final or, preferably, merge this docket into MM Docket 00-148 so that the Joint Parties may have their proposal considered on its merits without the influence of several other contingent, subsequent, and untimely filed proposals.

4. In claiming that it has cut-off protection from the Joint Parties' counterproposal in this proceeding, Munbilla is, in effect, attempting to remove the contingency from its contingent KHLE construction permit. It is attempting to step in line in front of the Joint Parties, who were clearly in line first. Munbilla cites no precedent in support of this proposition. The Commission should hold that Munbilla is not entitled to cut-off protection from the Joint Parties' Counterproposal in MM Docket No. 00-148 or against any refiling of the same proposal.

## **II. There are Equities in Favor of Approving the Joint Parties' Counterproposal**

5. The Joint Parties proposal to provide a first local service to two large communities (Converse and Lago Vista, TX) and a large increase in overall population and area has never been considered on its merits. That is all the Joint Parties ask. When Munbilla emphasizes in its May 24, 2005, Reply Comments that it has constructed its facility and is now operating pursuant to the authorization, it is clearly trying to influence the Commission into avoiding the termination of the service currently provided by Station KHLE. Such a ploy must be ignored or else the Auburn policy will have been manipulated and abused by those parties that the Commission is trying to help. The Commission may compare the public interest benefits of the Burnet site preference with the benefits of the Joint Parties proposal if it wishes. But it cannot allow Munbilla to gain a procedural advantage over the Channel 297A proposal for Llano.

6. The Joint Parties previously suggested that Munbilla could relocate to a site which clears the use of Channel 297A for KAJZ at its current site or Station KHLE could protect the KAJZ proposal under Section 73.215. The Joint Parties were not suggesting that the Commission force Munbilla to do so. A transmitter site may potentially be modified at any time during the consideration of a rule making proceeding. Indeed, the Commission's preference is to modify the reference coordinates specified in a rule making proposal in order to protect a

pending application or to resolve a conflict between the rule making proposal and an application.<sup>4</sup> Therefore, the Commission should take into account that there are other options for resolving this conflict.

7. The Joint Parties have waited nearly 7 years for its proposal to be considered on its merits. There have been numerous delays encountered including a Court of Appeals decision affecting proposals in Benjamin and Mason, Texas. Each time the Joint Parties rights have been acknowledged but somehow its proposal never gets considered. This latest road block should not stand in the way. It can easily be removed by ruling in MM Docket No. 00-148 on the merits, a consolidation of the two proceedings, or the use of other alternative technical solutions. Regardless of the method, the Commission should not allow Munbilla to use the *Auburn* decision to preclude Commission consideration of the Joint Parties' long standing proposal.

8. Despite the passage of time and the enormous amount of expense in having to participate in the various related proceedings stemming from MM Docket No. 00-148, the Joint Parties remain interested and committed to providing the public with the benefits of its proposal.


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<sup>4</sup> See *Greenville, Texas*, 6 FCC Rcd 6048 (MB1991); *Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13458 at ¶ 8 (MB1998); *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8

WHEREFORE, for the foregoing reasons, the Commission should consider the Joint Parties' Counterproposal on its merits.

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June 15, 2007

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Elbert Oriz, a legal secretary in the law firm of Wiley Rein LLP do hereby certify that I have on this 15th day of June, 2007, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **“Reply Comments”** to the following:

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